RECENT CASES

BANKS AND BANKING—CHECK COLLECTIONS—EFFECT OF AGREEMENT WITH CUSTOMER PERMITTING ACCEPTANCE OF DRAFTS ON DRAWEE AS CONDITIONAL PAYMENT—Plaintiff deposited check with customer bank under an agreement [1] permitting the bank to forward items for collection directly to any bank, including the drawee, and "to accept drafts of such banks (but only subject to payment) as conditional payment in lieu of cash". Customer bank forwarded the check to collecting bank which surrendered it to drawee upon receiving drawee's draft on another bank. Before collecting bank could realize on the draft the drawee bank was closed for liquidation and the draft dishonored. *Held* (reversing court below), that collecting bank having acted negligently in giving up customer's check before payment was completed, plaintiff was entitled to recover from the collecting bank under the "Massachusetts" rule.[2] *People's Gin Co. v. Canal Bank & Trust Co. et al.*, 144 Co. 858 (Miss. 1932).

In collection cases the customer bank, under the "New York" rule, is liable to its depositors for all defaults in the collection process.[3] Under the "Massachusetts" rule, however, it is liable only for its own negligence and its correspondents are liable directly to the depositor.[4] One of the outstanding bases for liability under either rule has been a failure to observe the requirement of receipt of proceeds in cash only.[5] This rule has been attacked as being at variance with modern banking methods.[6] In several states it has been overruled by judicial recognition of banking custom.[7] In a number of others it has been abrogated by statute [8] and in still others the banks have endeavored to avoid it by stipulations contained on the signature cards or deposit slips.[9] The provision in the instant case is greatly similar to that evolved by counsel for the American Banker's Association [10] and in at least one instance such an agreement has been held to relieve the

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[1] Contained on plaintiff's signature card.

[2] The court sent the case back to determine the rights of the collecting bank against the customer bank, raised by a cross-bill filed by collecting bank.

[3] St. Nicholas Bank v. State Nat. Bank, 128 N. Y. 26, 27 N. E. 849 (1891); Harter v. Bank of Brunson, 92 S. C. 440, 75 S. E. 696 (1912). The rule is based on the theory that the bank will undertake the collection by methods of its own selection, generally by the appointment of sub-agents.

[4] Federal Reserve Bank v. Malloy, 264 U. S. 160 (1924); 1 MORSE, BANKS AND BANKING (6th ed. 1928) § 275. This rule is based on the theory that correspondents are essential to collection and that the customer, therefore, impliedly authorizes their selection.

[5] The collecting agent is presumed to lack authority to accept anything not legal tender in payment of his principal's debt. See 1 MECHEM, AGENCY (2d ed. 1914) § 946. Nor does permission to forward items directly impliedly authorize acceptance of payment by draft: Federal Reserve Bank v. Malloy, *supra* note 4.

[6] See Turner, *Bank Collections—The Direct Routing Practice* (1930) 39 YALE L. J. 468, 483.

[7] Cattaruzza v. First Nat. Bank, 106 W. Va. 458, 146 S. E. 393 (1928); United States F. & G. Co. v. Forest County State Bank, 199 Wis. 560, 227 N. W. 27 (1929).

[8] Prior to the drafting of the Bank Collection Code the following states permitted the acceptance of remittance drafts in lieu of currency by statute: Cal. Stats. 1925, c. 312, § 5; Colo. Laws 1923, c. 64; Mont. Laws 1925, c. 65; Ore. Laws 1920, § 6217; S. C. Acts 1927, No. 202; S. D. Laws 1921, c. 31; Tenn. Acts 1921, c. 37.

[9] Pierson, *Legislation Relating to Problems of Check Collection* (1928) 14 A. B. A. J. 406, 408; Note (1933) 46 HARV. L. REV. 687; Bogert, *Failed Banks, Collection Items and Trust Preferences* (1931) 29 MICH. L. REV. 545, 558.

[10] By Thomas Paton (see 2 PATON, DIGEST (1926) § 1446a), which reads in part: "This bank or its correspondents may send items, directly or indirectly, to any bank, including the payor, and accept its draft or credit as conditional payment in lieu of cash. . . ."

collecting bank of liability to the depositor.[11] In the present case the court reached a contrary result by construing strictly the agreement between the bank and the customer, holding that the words "conditional payment" made it negligence to give up the customer's check before receiving payment in full. While this construction seems rather forced, it is believed that the result—placing the responsibility for accepting other than cash upon the collecting bank—is commendable. The Bank Collection Code, which has been enacted in some eighteen jurisdictions, including Pennsylvania,[12] adopts a contrary rule.[13] The Uniform Bank Collection Act,[14] however, holds the collecting bank responsible upon the theory that it "is usually in position to demand payment in manner satisfactory to it".[15]

BONDS—GOLD CLAUSE—RIGHT TO PAYMENT IN GOLD COIN AND AMOUNT OF SUCH PAYMENT—Defendant, a Belgian company, issued bearer bonds through a London issuing house, which bonds were specifically to be governed by English law. A summons was taken out by plaintiff, a holder of one of them, to determine the construction of the instrument in regard to its payment. Across the middle of the document in bold type was "Bond for One Hundred pounds", while in each corner, and superimposed upon the small lettering was "£100." However, in the initial paragraph, payment was promised of "the sum of £100 in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the first day of September 1928." One of the conditions on the back was liability in gold coin. *Held,* that the bond was to secure payment of £100, not the value of the defined gold; nor was the payment in gold coin required, being unenforceable under the Coinage Act of 1870.[1] *Re Société Intercommunale Belge d'Electricité, Feist v. The Company,* High Court of Justice, Chancery Division, October 27, 1932.

The court was faced with the dilemma of two mutually exclusive constructions: a) that the instrument promised £100 when due, thereby giving effect to the large type and the many figures; b) that the promise was to pay the sum, in currency or coin, necessary when due to buy the quantity of gold of the value of £100 in 1928 (an amount at present much more than £100). To adopt the latter construction would make the sum payable unascertained until the date of payment, and in consideration thereof the court adopted the former construction. In addition, it was ruled that payment could not be enforced in gold coin. Since it was a general debt, a debtor could not be forced to pay in any particular form of legal tender. There was apparently no precedent in England upon any phase of the case,[2] but the latter problem of form of payment is not a new one in the United States. Subsequent to the Legal Tender Act,[3] many states held that a

[11] E. S. Macomber Co. v. Commercial Bank, 166 S. C. 236, 164 S. E. 596 (1932).

[12] Pa. Bank Collection Act (1931) P. L. 568. See Legislation (1932) 81 U. OF PA. L. REV. 201.

[13] Section 9.

[14] HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS (1931) 256, § 39. (No changes were made at the 1932 Conference.)

[15] The comment continues: "The clearing house may check up on any member in weak condition and if need be require security to cover settlement drafts. The case is not like the mail remittance situation where no other practicable way is available, except to remit in exchange."

[1] 33 and 34 VICT. c. 10 (1870).

[2] The only case mentioned by the court was the decision of the World Court in the Case Concerning the Payment in Gold of Brazilian Federal Loans Issued in France, (1929) Fifth Annual Report of the Permanent Court of International Justice 216; and their conclusion was not followed.

[3] 12 STAT. 345, 532 (1862); *cf.* 31 U. S. C. A. (1927) 451 *et seq.*

specific requirement of gold coin or the like was unenforceable,[4] but the Supreme Court decision in *Bronson v. Rodes,*[5] giving effect to such a clause, settled the question.[6] This interpretation was correct as a question of statutory construction, but the almost universal abandonment of the gold standard creates a new aspect. The English court in the instant case, unfettered by precedent and the rule of *stare decisis,* had little difficulty in arriving at a result justified by present economic stress. An American court will undoubtedly reach a similar conclusion, when the question arises,[7] although over more barriers. Not only is there a contrary decision by the highest court of the land, but if that case is substantially reversed, an interpretation of the Legal Tender Acts, limiting the freedom of contract, must be found constitutional.[8] It is right that in a changing world the law should change relatively to serve best the interests of society;[9] but it will be interesting to learn the form of words by which American courts will achieve the conclusion of the instant case.

CONSTITUTIONAL LAW—CONTEMPT—NOTARIES—POWER OF NOTARY TO COMMIT WITNESS FOR REFUSAL TO TESTIFY BY DEPOSITION BEFORE HIM AS VIOLATIVE OF DUE PROCESS—An Ohio statute which provided for the taking of depositions before a notary granted to him the powers of subpœna, and of fining or committing for contempt witnesses who failed to appear or answer questions properly put.[1] The witness was accorded the opportunity of an immediate judicial review of the commitment.[2] The plaintiff was remanded to the custody of the defendant sheriff in accordance with the above procedure and on the commitment being affirmed seeks on this appeal to have the sections of the statute applicable declared unconstitutional under the Fourteenth Amendment. *Held,* that the statute was constitutional. *Ex Parte Bevan,* 184 N. E. 393 (Ohio 1933).

The exact nature of the notarial power to take depositions as granted by statutes of this type is in dispute. Some cases, in view of the power of subpœna, the duty to rule on questions of evidence, and the purported grant of power to commit for contempt,[3] treat the power as judicial.[4] Other jurisdictions have felt

[4] Whetstone v. Colley, 36 Ill. 328 (1865); Thayer v. Hedges, 23 Ind. 141 (1864); Ritey v. Sharp, 1 Bush 348 (Ky. 1866); Appel v. Woltmann, 38 Mo. 194 (1860); Laughlin v. Harvey, 52 Pa. 9 (1866).

[5] 7 Wall. 229 (U. S. 1869).

[6] Bronson v. Rodes, *supra* note 5, was followed in: Butler v. Horwitz, 7 Wall. 258 (1869); Bronson v. Kimpton, 8 Wall. 444 (1869); Trebilock v. Wilson, 12 Wall. 687 (1872); Munter v. Rogers, 50 Ala. 283 (1873); McGoon v. Shirk, 54 Ill. 408 (1870); Chrysler v. Renois, 43 N. Y. 209 (1870).

[7] The desertion of the gold standard as well as the fact that all gold has been collected by the United States Government makes a judicial controversy inevitable. Where the latter is involved, impossibility of performance would seem a defense, but would damages be the value of that amount of gold or merely the stated amount in other legal tender?

[8] See Johnson, *Constitutional Limitations and the Gold Standard* (1933) 67 U. S. L. REV. 187.

[9] *Cf.* Cardozo, *The Paradoxes of Legal Science* (1928) 14-15.

[1] OHIO GEN. CODE (Throckmorton, 1930) §§ 11510-11512.

[2] OHIO GEN. CODE (Throckmorton, 1930) § 11514.

[3] This power is purely statutory and was clearly non-existent at common law. Burtt v. Pyle, 89 Ind. 398 (1883); Johnson v. State, 54 Tex. Crim. App. 113, 111 S. W. 743 (1908). But if the notary cited the witness to the commissioning court, it would often hold him in contempt of its mandate. See JOHN, AMERICAN NOTARIES (3d ed. 1922) 200 and cases there cited.

[4] People *ex rel.* McDonald v. Leubischer, 34 App. Div. 577, 54 N. Y. Supp. 869 (1898); Noell v. Bender, 317 Mo. 392, 295 S. W. 532 (1927). "Judicial" as used here is used merely in the sense used in constitutional provisions vesting "judicial" power in certain bodies.

that his functions were ministerial or administrative.[5] In the states where the functions are considered judicial, the constitutionality of the statute creating them depends upon the particular provisions in the local constitution controlling the exercise of judicial functions.[6] But where the notary is considered as acting not judicially in committing recalcitrant witnesses, a new problem of constitutionality arises under the Fourteenth Amendment. The notary's power is analogous to that of administrative officers who are permitted to summarily deprive citizens of property rights in the course of their duty. It is generally held that such deprivations are by due process of law if a hearing before an appropriate tribunal is provided at any time, even subsequent to the deprivation,[7] and even if the hearing takes the form of a collateral attack on the administrative officer's judgment.[8] Such requirement is fulfilled in the principal case by the statutory provision for judicial review. However, it is possible that the federal courts, when called upon to pass on the matter,[9] will distinguish between a deprivation of property for which damages will compensate adequately, and a deprivation of personal freedom. The convenience and utility of depositions, however, and the necessity for a strong sanction to prevent the collapse of the entire device would seem to militate against such a distinction being made.[10]

CONSTITUTIONAL LAW—FREEDOM OF SPEECH—THE JUSTIFYING OF ACTS OF VIOLENCE AS CRIMINAL SYNDICALISM—The defendant, speaking only to a governmental official and one other person, boasted that if given an opportunity he would destroy an airship upon which he was working. For this statement, he was indicted under an Ohio statute [1] for justifying crime, sabotage or violence as a means of accomplishing industrial or political reform. The lower court, holding the statute unconstitutional, sustained a demurrer to the indictment, and the prosecutor, by statutory procedure,[2] appealed to determine the validity of the

[5] *Re* Huron, 58 Kan. 152, 48 Pac. 574 (1897); De Camp v. Archibold, 50 Ohio St. 618, 35 N. E. 1056 (1893).

[6] The powers of judicial bodies to commit for contempt is recognized as due process under the Fourteenth Amendment. Eilenbecker v. Plymouth County, 134 U. S. 39, 10 Sup. Ct. 424 (1890); Rothschild v. Steiger Piano Mfg. Co., 256 Ill. 196, 99 N. E. 920 (1912). As to the effect of local constitutions see *Re* Huron, *supra* note 5 (held the delegation of judicial power was improper).

[7] People *ex rel.* Copcutt v. Board of Health, 140 N. Y. 1, 35 N. E. 320 (1893); Salem v. Eastern R. Co., 98 Mass. 431 (1868).

[8] Louisville, *etc.* R. Co. v. Western Union Tel. Co., 250 U. S. 363, 39 Sup. Ct. 513 (1919) (proceeding in equity necessary to provide hearing).

[9] The Fourteenth Amendment was brought into view only in the two cases cited *supra* note 5 and never in a federal court.

[10] This idea seems to have motivated the court in *In re* Abeles, 12 Kan. 451 (1874).

[1] OHIO GEN. CODE (Page, 1931) §§ 13421-23, 13421-24, the latter of which states: "Any person who . . . openly, wilfully, and deliberately justifies, by word of mouth or writing, the commission or the attempt to commit crime, sabotage, violence or unlawful means of terrorism with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism . . . is guilty of a felony. . . ."

[2] OHIO GEN. CODE (Page, 1931) § 13446-4 providing that the appellate decision "shall not affect the judgment of the court of common pleas" which released the defendant, but only "shall determine the law to govern in a similar case". The majority of the court, in broad generalities, delivered what was essentially an advisory opinion, refused to consider the case on its particular facts, and failed to answer the contention of the dissent that in its condemnation of mere justification of violence the statute was invalid. If we consider the factual dependence of most constitutional decisions, the juridical tradition of confining cases to issues born of the specific facts, and the necessity of factual precision in effectively establishing rules to guide lower courts, and the attendant danger of indefiniteness, the view here taken by the court would seem to be unfortunate. See Frankfurter, *Note on Advisory Opinions* (1924) 37 HARV. L. REV. 1002.

law. *Held* (two justices dissenting), that the statute was a constitutional exercise of the police power. *State v. Kassay,* 184 N. E. 521 (Ohio 1933).

The important problem here involved is whether the statute denied the freedom of speech that is protected by the due process clause of the Fourteenth Amendment to the United States Constitution.[3] A distinction has been made in criminal syndicalism statutes between those that prohibit acts involving the probability of, and intended to effect, specific substantive evils,[4] and those that condemn merely the teaching of the doctrine of reform through revolution because of the inherent danger to public interests.[5] To the first, the courts applied the now classic test that freedom of speech will only be denied when the words create a "clear and present danger" of the commission of the substantive evils.[6] As to the second type, however, the Supreme Court has declared that if in the judgment of the legislature the mere advocacy of a doctrine in a certain manner is inimical to public interests, this conclusion is binding upon the Court whose only function then is to determine whether the defendant advocated the condemned doctrine in the prohibited manner.[7] The persistent opposition to this view by members of the Supreme Court,[8] the logical implication that, as to freedom of speech, it removes from the states the restraints of the due process clause, and the unsatisfactory result it would produce in cases like the instant one, are persuasive of its unsoundness. If the purpose of criminal syndicalism statutes is to prevent violence and crime, it is difficult, in the light of American tradition, to appreciate the propriety of a law which makes criminal a justification without incitement, and which would permit prosecutions not only for condonement of past violence,[9] but as well for a condonement coupled with admonitions that future violence would be inexpedient. Fortunately, the Supreme Court has more recently retreated from its dubious position, and has considered whether there is any reasonable and proper connection between the acts condemned and the danger of violence.[10] Thus, where the displaying of a red flag was declared illegal, the court pointed out that such act did not create a probability of violence, although the legislature

[3] It is included in the concept of "liberty". Gitlow v. New York, 268 U. S. 652, 45 Sup. Ct. 625 (1925); see Note (1927) 76 U. OF PA. L. REV. 198. The more narrow protection of freedom of speech in Ohio Constitution, art. I, § 11, also applies, and the court admitted the persuasiveness of decisions under the First Amendment of the Federal Constitution. *Cf.* Note (1928) 41 HARV. L. REV. 525, 528.

[4] Such as the Espionage Act, 40 STAT. 219 (1917), 50 U. S. C. § 33 (1926), which was designed to prevent the substantive evils of insubordination, disloyalty, and resistance to the draft. See Debs v. United States, 249 U. S. 211, 39 Sup. Ct. 252 (1919); Abrams v. United States, 250 U. S. 616, 40 Sup. Ct. 17 (1919).

[5] This type, like that in the instant case, *supra* note 1, which is similar to IDAHO COMP. STAT. (1919) § 8581, 3 and ORE. CODE ANN. (1930) § 14-3, 112, is quite prevalent. See CHAFEE, FREEDOM OF SPEECH (1920) 402-405; Note (1920) 20 COL. L. REV. 232.

[6] Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247 (1919).

[7] Gitlow v. New York, *supra* note 3, at 670, 45 Sup. Ct. at 631. The rule was applied in Fiske v. Kansas, 274 U. S. 380, 47 Sup. Ct. 655 (1926), in which the Court merely determined whether the defendant had violated the statute. *Cf.* Burns v. United States, 274 U. S. 328, 47 Sup. Ct. 650 (1926).

[8] Holmes and Brandeis, JJ., consistently maintained, ever since its establishment in the Schenck Case, *supra* note 6, the proposition that freedom of speech is limited only when the words create a probability of violence, sabotage or crime. Of especial interest is their dissent in the Gitlow case, *supra* note 3, and their concurrence in Whitney v. California, 274 U. S. 357, 47 Sup. Ct. 641 (1926), in which they looked to the emergency nature of the statute. For other criticism in accord see Note (1928) 41 HARV. L. REV. 525, 528; CHAFEE, FREEDOM OF SPEECH (1920) 187-194.

[9] The dissent in the instant case points out, at pp. 528-529, that the broad terms of the statute would permit prosecutions for justifications of the American Revolution.

[10] Whitney v. California, *supra* note 8, in which the Court considers, at pp. 371, 372, 47 Sup. Ct. at 646, 647, whether mere membership in a society advocating violence creates a greater likelihood of violence.

apparently thought that it did.[11] Even under a rule as conservative as this, a narrow concept of freedom of speech would demand that the broad, inappropriate provisions of the statute in the instant case be declared unconstitutional.

CORPORATIONS—ULTRA VIRES CONTRACTS—IMPROPRIETY OF BANKING CORPORATION'S ACQUISITION OF SHARES AS DEFENSE TO BREACH OF AGREEMENT FOR THEIR PURCHASE—Plaintiff sued defendant banking corporation for breach of an agreement to purchase certain shares. A Pennsylvania statute [1] provided that any corporation may purchase shares of any other corporation. Defendant bank failed to plead that such transaction was *ultra vires*. *Held,* that the statute was not applicable to banking corporations; that therefore the contract was *ultra vires* and utterly void; that failure to plead it was no waiver of such defense. *Dillon, Read & Co. v. Commercial State Bank,* 62 F. (2d) 606 (C. C. A. 3d, 1932).

Although it has been frequently enunciated as the federal rule that *ultra vires* contracts, not fully executed, are "void" and not merely "voidable",[2] an examination of the federal decisions fails to substantiate this statement of the rule.[3] In certain situations,[4] effect has been given to transactions that were said to be *ultra vires,* even though the court at the same time admitted the existence of the doctrine. It would therefore seem more expedient simply to determine whether or not some legal effect shall be given to a particular transaction. If a sufficiently analogous situation has previously been adjudicated, the case before the court should be controlled thereby under the principle of *stare decisis;* but it seems legally unsound to formulate a general rule, predicated upon one factual situation, and permit it to govern other vastly dissimilar situations. The cases relied upon by the court to sustain the proposition that *ultra vires* contracts are void, involve elements entirely foreign to the instant case. In those cases and in others where no effect was given to the transaction, the important considerations were that the transaction was contrary to "public policy" in that a "quasi-public" corporation had attempted to transfer to others the rights and powers it had been given under its franchise;[5] or that the particular act was prohibited by statute.[6] The instant

[11] Stromberg v. United States, 283 U. S. 359, 51 Sup. Ct. 532 (1930).

[1] PA. STAT. ANN. (Purdon, 1930) tit. 15, § 661.

[2] See Central Transportation Company v. Pullman's Palace Car Company, 139 U. S. 24, 59, 11 Sup. Ct. 478, 488 (1891); BALLANTINE, PRIVATE CORPORATIONS (1927) 258; 7 FLETCHER, CYCLOPEDIA CORPORATIONS (1931) § 3468.

[3] See Carpenter, *Should the Doctrine of Ultra Vires Be Discarded?* (1923) 33 YALE L. J. 49, 52.

[4] Purportedly *ultra vires* contracts were given effect in the following cases: Salt Lake City v. Hollister, 118 U. S. 256, 6 Sup. Ct. 1055 (1886) (a tax levied on business said to be *utra vires* the corporation was sustained); Kerfoot v. Farmers' and Merchants' Bank, 218 U. S. 281, 31 Sup. Ct. 14 (1910) (the corporation had been a conduit of title acquired in an *ultra vires* transaction); Citizens' Central National Bank v. Appleton, 216 U. S. 196, 30 Sup. Ct. 364 (1910) (the corporation had received the benefits of the transaction).

[5] Central Transportation Company v. Pullman Palace Car Co., *supra* note 2; Thomas v. Railroad Company, 101 U. S. 71 (1879); The York & Maryland Line Railroad Company v. Winans, 17 How. 30 (1854); Pennsylvania Railroad Company v. St. Louis, Alton & Terre Haute Railroad Company, 118 U. S. 290, 6 Sup. Ct. 1094 (1886). In these cases the corporations (railroad companies) had given long-time leases of their railroad, rolling stock and franchises. "Where a corporation, like a railroad company, has granted to it by charter a franchise intended in a large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and

case presented none of the above elements: while a bank might be regarded as "quasi-public", the transaction did not involve a transfer of its charter rights. The mere purchase of shares cannot be said to be contrary to public policy; nor was it prohibited by statute. The court was therefore free to be guided by the equities of the case, and it is unfortunate that it did not scrutinize them more closely. Thus, though it is true the defendant bank did not receive any benefits from the transaction, nevertheless the plaintiff suffered great loss by relying upon the contract and refraining from selling the shares to other possible purchasers at the then market price.

COURTS—CRIMINAL CONTEMPT BY JUROR—EVIDENCE—LOSS OF JUROR'S PRIVILEGE UPON FALSE STATEMENTS AS TO LACK OF BIAS—Defendant, a member of a jury panel, upon *voir dire* examination as to qualifications for service stated that she was unbiased, intentionally concealing the fact of her former employment by corporation of which parties to the case had been officers. *Held,* that such concealment and misstatement was punishable as a criminal contempt. *Clark v. United States,* 53 Sup. Ct. 465 (1933)

Inasmuch as the purpose of the *voir dire* examination of a prospective juror as to his qualifications is to determine whether cause for challenge exists or whether it is advisable to exercise the right of peremptory challenge,[1] it is apparent that a prospective juror who makes false or deceptive answers as to a material matter, such as lack of bias, is guilty of criminal contempt for obstructing the court in the performance of its duty.[2] The court in the instant case found little difficulty in so holding. The interesting feature of the case, however, rests in the court's treatment of the point which constituted the principal reason for appeal. The trial court had admitted in evidence testimony as to statements made by defendant while in the jury room.[3] It was urged that this was a violation of the rule that such statements are privileged.[4] It was pointed out that the principle is based upon sound public policy since only by the assurance of absolute secrecy can the complete ease and freedom of discussion be secured which is so essential to the securing of final unanimity among the jurors.[5] It should be noted here that this reasoning is generally relied on as the basis for refusing to allow a juror

is void as against public policy." Thomas v. Railroad Company, *supra* at 83. See also TAYLOR, PRIVATE CORPORATIONS (5th ed. 1902) 131, 132; 2 MORAWETZ, PRIVATE CORPORATIONS (2d ed. 1886) 1129. In this latter work it is said that ". . . whenever the aid of the government is granted to a private company in the form of a monopoly, or a donation of public property or funds, or a delegation of the power of eminent domain, the grant is subject to an implied condition that the company shall assume an obligation to fulfil the public purpose on account of which the grant was made. . . . Any act of the company which would disable it from performing its duties to the public would be prohibited by law."

[6] Weber *et al.* v. Spokane Nat'l Bank *et al.,* 50 Fed. 735 (C. C. D. Wash. 1892).

[1] Pearcy v. Michigan Mut. Life Ins. Co., 111 Ind. 59 (1886); 1 THOMPSON, TRIALS (2d ed. 1912) § 101; ABBOTT, BRIEF FOR THE TRIAL OF CIVIL ISSUES (2d ed. 1900) § 52.

[2] *In re* NUNNS, 188 App. Div. 424, 176 N. Y. Supp. 858 (1919). "An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is . . . the characteristic upon which the power to punish for contempt must rest." White, C. J., in *Ex parte* Hudgings, 249 U. S. 378, 383, 39 Sup. Ct. 337, 339 (1918).

[3] The statements were admitted as bearing upon the state of mind of the defendant at the time she was examined, United States v. Clark, 1 Fed. Supp. 747, 750 (D. Minn. 1931).

[4] Hewett v. Chapman, 49 Mich. 4 (1882); 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2346; HUGHES, EVIDENCE (1907) 301. The court, in its opinion in the instant case, at 470, points out that while this rule is quite generally accepted, it is largely based upon *dicta* in the adjudicated cases, which are significant because they bear with them the implication of an immemorial tradition.

[5] M'Kain v. Love, 2 Hill 506 (S. C. 1834); 5 WIGMORE, *loc. cit. supra* note 4.

to impeach his own verdict.[6] The very fact, however, that the rule of privilege is based upon grounds of public policy indicates that it is not beyond the reach of a higher, conflicting policy which may be involved in a given situation.[7] In the instant case it is undeniable that it was just as essential that the jury's proceedings should be free from fraud and corruption as that they should be privileged. Therefore, while the court could have ignored appellant's contention,[8] it should be commended for its enunciation of what is an altogether proper limitation on the rule of privilege, that upon a *prima facie* showing [9] that a juror attained his position through fraud or fraudulently continued it, the privilege should be withdrawn.

CRIMINAL LAW—ENTRAPMENT AS A DEFENSE—DEFENSE DENIED WHERE DEFENDANT HAD HABITUALLY ENGAGED IN "MORALLY INDISTINGUISHABLE CONDUCT"—For the purpose of securing evidence of defendant's violation of a federal statute forbidding the shipment of obscene matter in interstate commerce, postal inspectors induced *A*, a local customer of the defendant, to give the defendant an order purporting to come from *B* calling for the shipment of obscene materials to *B* in a foreign state. *A* told the defendant that *B* was his customer. *B* was in fact a post-office inspector. The defendant shipped the goods. Although he was admittedly engaged in the local sale of obscene literature it was not shown that he had ever previously shipped such materials across state lines. The defendant pleaded "entrapment". *Held*, that the defense of "entrapment" is not available to one "already engaged in conduct morally indistinguishable" from the act with which one is charged. *United States v. Becker*, 62 F. (2d) 1007 (C. C. A. 2d, 1933).

The essence of the defense of "entrapment" is that the crime originated in the mind of a public officer who induced its commission by one who would not otherwise have so acted.[1] This defense, although not permitted by most state courts, is generally permitted by the federal courts, but had not been directly passed upon by the Supreme Court before the recent case of *Sorrells v. United States*.[2] The court in the instant case invoked the implication of that case to the effect that the defense of "entrapment" is not available to one who has been led

[6] Two further factors are involved in this latter situation, however: (1) that a witness should not be allowed to impeach his own verdict, and (2) that the parol evidence rule is applicable to verdicts as well as other writings. See 5 WIGMORE, *loc. cit. supra* note 4; HUGHES, *op. cit. supra* note 4, 302-6.

[7] Relations between attorney and client are privileged until there is a showing that legal advice was sought to serve in the perpetration of a fraud. *Re* Postlewaite, L. R. 35 Ch. Div. 722, 724 (1887). Equally the deliberations of grand jurors are privileged but the testimony of a grand juror is admitted before a petit jury to impeach the credibility of a witness when testifying before the latter. Izer v. State, 77 Md. 110, 26 Atl. 282 (1893).

[8] There was enough evidence of concealment and mistatement to sustain the trial court's judgment without the testimony as to what occurred in the jury room.

[9] As to the function of a judge in the decision of such preliminary questions see: Maguire and Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence* (1926) 40 HARV. L. REV. 392, 397, 403; Morgan, *Functions of Judge and Jury* (1929) 43 HARV. L. REV. 165; Maguire and Epstein, *Rules of Evidence in Preliminary Controversies as to Admissibility* (1927) 36 YALE L. J. 1101.

[1] United States v. Lynch, 256 Fed. 983 (S. D. N. Y. 1919); Newman v. United States, 299 Fed. 128, 131 (C. C. A. 4th, 1924); Capuano v. United States, 9 F. (2d) 41 (C. C. A. 1st, 1925); Sorrells v. United States, 53 Sup. Ct. 210, 215 (1932); Comments (1929) 2 S. CAL. L. REV. 283, 287; Note (1930) 44 HARV. L. REV. 109.

[2] *Supra* note 1. That the Sorrells case is the Supreme Court's first adjudication of the defense of "entrapment" is recognized by the court in the Sorrells case at 213. See also (1933) 46 HARV. L. REV. 848; (1933) 13 B. U. L. REV. 293.

merely to furnish a specific instance of a course of habitual criminal conduct.[3] Although it is generally conceded that defendants who pled "entrapment" have committed the acts designated as criminal,[4] the courts will either read this defense into the statute [5] or, as has been suggested, will refuse to lend the aid of their processes to what they deem an unconscionable prosecution.[6] Since the defense is properly admissible for the protection of the "hitherto innocent" it seems reasonable to restrict its use to that class and to refuse it to habitual wrongdoers. It has been urged that the court should be so shocked by the conduct of the prosecuting officer that it should not lend its aid to prosecution and should treat an inquiry into defendant's past conduct as improper.[7] This contention was rejected by the majority in the *Sorrells* case; the conflict on this point substantially reflecting the opinion of the same court on the question of illegally obtained evidence.[8] While it is true that in the instant case it is not shown that the defendant had previously committed a federal offense, a realistic view of this defense would demand a disregard of the technical differences of identity between the sovereigns sinned against. The refusal of the court in the instant case to permit the defense to be available to one who had previously engaged in similarly reprehensible conduct which, although it did not constitute an offense against the federal government, was an offense against another sovereign, the state,[9] is deserving of commendation.[10]

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[3] Sorrells v. United States, *supra* note 1, at 216; *cf.* Butts v. United States, 273 Fed. 35, 37 (C. C. A. 8th, 1921); Simmons v. United States, 300 Fed. 321 (C. C. A. 8th, 1924); Comments (1929) 2 S. CAL. L. REV. 283, at 290; Note (1930) 44 HARV. L. REV. 109, at 112.

[4] Note (1928) 28 COL. L. REV. 1067, 1068. See the opinion of Mr. Justice Roberts in Sorrells v. United States, *supra* note 1, at 218. It is noticeable that the decisions speak of defendant's "commission of the crime" and yet ponder upon the problem of whether prosecution is proper.

[5] This was the procedure adopted by the court in Sorrells v. United States, *supra* note 1. *Cf.* United States v. Whittier, 5 Dill. 35, Fed. Cas. No. 16,688 (C. C. E. D. Mo. 1878); United States v. Adams, 59 Fed. 674 (D. Ore. 1894).

[6] The dissenting justices in the Sorrells case at 218 deny the propriety of reading the defense into the statute. They would, however, have the courts refuse to open their doors to the trial of crimes instigated by the government's own agents. This would appear to be less objectionable than the view taken by the majority of the court, that the defense should be read into the statute, since it savors less of a strained judicial construction of the statute than of the creation of rules of court.

[7] This position was urged by the minority in the Sorrells case.

[8] See Olmstead v. United States, 277 U. S. 438, 469, 471, 48 Sup. Ct. 564, 570, 575 (1928). "The issue in that case between greater facility in convicting criminals on the one hand and the loss of respect for a government which comes into court with unclean hands on the other, clearly set out in the . . . dissenting opinions, is fundamentally the issue here [in the Sorrells case]." (1932) 41 YALE L. J. 1249, 1252; *cf.* Casey v. United States, 276 U. S. 413, 48 Sup. Ct. 373. In the words of Mr. Justice Holmes' dissent in the Olmstead case: "We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part." 277 U. S. at 470, 48 Sup. Ct. at 575.

[9] N. Y. PENAL LAW (1909) §§ 1141-1143. The fact that defendant's traffic in these materials was criminal, at least insofar as the state was concerned, would seem to distinguish this case from that of United States v. Eman Manufacturing Co., 271 Fed. 353 (D. Colo. 1920) where the offense charged consisted of defendant's *initial* shipment of misbranded medicines in interstate commerce in fulfillment of the request of a federal officer.

[10] It is recognized that the scope of "entrapment" as a defense is determined more by a consideration of the public good than by an application of fixed legal precepts. See (1933) 46 HARV. L. REV. 848, 849. See Note (1928) 28 COL. L. REV. 1067, at 1072, where it is indicated that the scope of activities permitted a public officer in his search for law-breakers differs in various offenses with due consideration being given to the repugnancy of the offense, the difficulty of procuring evidence, the fact that the inducement offered would not have tempted one not already engaged in similar crimes, *etc.* See also BORCHARD, CONVICTING THE INNOCENT: *Icie Sands* (1932) at 357.

DIVORCE—MISTAKE OF LAW—VALIDATION OF DECREE UNDER UNCONSTITUTIONAL STATUTE BY SUBSEQUENT ACTS OF PARTIES AFFECTED—In 1925, a decree of divorce, as authorized by statute,[1] was entered at request of defendant against plaintiff, his wife. In 1929, the statute was declared by the state supreme court unconstitutional,[2] and plaintiff, more than a year later, made motion to vacate the decree. By this time, defendant, in reliance on decree, had remarried. *Held,* that plaintiff's delay and defendant's reliance validated the decree, though based on an unconstitutional statute; that plaintiff was presumed to have known the actual *status* of the law, and hence should have appealed from the illegal decree. *Jensen v. Jensen,* 18 P. (2d) 1016 (Colo. 1933).

However just the result of the principal case may be, it is a paradox that an unconstitutional statute, generally described by courts as "void", and "without effect",[3] can confer, by virtue of reliance upon it, any rights or defenses otherwise unavailable. Furthermore, if the settled maxim of the common law, that ignorance or mistake of law is no defense,[4] be applied unreservedly, the husband's reliance could not validate an unconstitutional decree, since he labored under a mistake of law in remarrying. But although in the main the maxim may be recognized as a necessary and supportable rule, the present situation provided an opportunity to make a reasonable exception. It is important that the *cause* of the mistake of law should always be considered. In criminal actions, and in fact all actions by the *state* against an individual, reliance upon a statute or adjudication subsequently invalidated should be a good defense.[5] And in civil suits, the defendant may set up a plea of mistake of law, if the *plaintiff* was the cause thereof.[6] Reliance upon an unconstitutional decree of divorce presents an intermediate case.[7] The difficult question arises as to how far reliance upon a representation by the state in the form of a statutory decree, invalid in character, can affect the rights of third persons. It was perhaps a desire to avoid this intricate problem which led the court in the principal case to term the plaintiff negligent in resting on her right of appeal, thus backhandedly to attribute to her a constructive knowledge of the law.[8] And so, in some measure, the husband was excused, and the wife penalized, because of mistake of law. It becomes clear that generalizations and maxims must crumble in particular situations, and that considerations of the peculiar equities of each suit and the parties involved are paramount.[9]

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[1] Colo. Laws 1925, 238.

[2] Walton v. Walton, 86 Colo. 1, 278 Pac. 780 (1929).

[3] Minn. Sugar Co. v. Iwesson, 91 Minn. 30, 97 N. W. 454 (1903).

[4] Phillips v. McConica, 59 Ohio 1, 51 N. E. 445 (1898). Even foreigners are subject to this conclusive presumption. Rex v. Esop, 7 C. & P. 456 (Eng. 1836). Belief, however reasonable, in the *unconstitutionality* of a statute is no defense. United States v. Anthony, 11 Blatchf. 200 (U. S. 1873). But where a specific intent is necessary for a crime, and ignorance of law negatives such intent, it is a good defense. Rex v. Hall, 3 C. & P. 409 (Eng. 1828).

[5] Texas Co. v. State, 31 Ariz. 485, 254 Pac. 1060 (1927); State v. Godwin, 123 N. C. 697, 31 S. E. 221 (1898); State v. O'Neil, 147 Iowa 513, 126 N. W. 454 (1910).

[6] See Townsend v. Cowles, 31 Ala. 428 (1858); Roder v. Wright, 6 Ind. 183 (1855).

[7] The majority of jurisdictions holds that the defendant is not thus relieved of civil liability. Norwood v. Goldsmith, 168 Ala. 224, 53 So. 84 (1910); Chenango Bridge Co. v. Paige, 83 N. Y. 178 (1880).

[8] "Whatever the law was, or is, Mrs. Jensen is presumed to have known it. This rule is sometimes a hard one, but without it states could not exist. If Mrs. Jensen's want of knowledge or information governs here then in many cases, perhaps most, statutes of limitation would be inoperative. Mrs. Jensen knew, almost as soon as the decree was entered, that it had been done on Jensen's motion. Presumably she knew that, for that reason, the decree was invalid. Presumably she knew that her timely protest would remove it." Burke, J., in principal case, at 1016.

[9] It must be borne in mind that reliance such as that in the principal case, to have merit, must occur before the statute has been declared unconstitutional. The *prima facie* validity of the statute, which operates to rebut the presumption of knowledge of the law, ceases at the moment the supreme court declares the statute invalid. Woolsey v. Dodge, 6 McLean 142 (C. C. U. S. 7th, 1854); Titus v. Poland Coal Co., 275 Pa. 431, 119 Atl. 540 (1923).

FUTURE INTERESTS—MARRIAGE SETTLEMENT—CONSTRUCTION OF "DURING HER LIFE OR UNTIL SHE SHALL MARRY AGAIN" AS AFFECTED BY DIVORCE AND REMARRIAGE—By a marriage settlement a trust was established with the husband's money, the income to be paid to him for life, then to the wife, if she should survive him, "during her life or until she shall marry again" then to the children. The marriage was dissolved in 1916. The wife married again in 1930. The husband died in 1932. *Held,* that the income should go to the wife until her death or a marriage entered into *after* the husband's death. *In re Munro's Settlement* [1933] 1 Ch. 82.

Both in this country [1] and in England [2] a divorce decree does not affect vested interests not dependent on coverture, unless by specific provision of the decree.[3] The nature of the interest is to be construed without bias arising from any thought that a divorced person probably would have been intended to take no benefit by the settlement. The court based its construction on the relation of the clauses. The clause vesting the interest precedes the clause providing for divestment. From this fact the court reasoned that the divesting event intended must be one following the vesting of the estate in enjoyment.[4] On that basis the divesting event had not happened and the wife properly received the income. There are said to be several methods of construction,[5] but generally they are resolved into two: the first usually referred to as the "English Rule", in which one seeks not the writer's intent, but the meaning of the language he has employed; the second, usually employed by American Courts, in which one seeks to reconstruct the writer's intent to provide for a contingency he overlooked.[6] According to the former method of construction, this court is clearly correct.[7] American courts would probably have reached a different result, by using the second method and searching for the intent. The thought that the settlor would have desired to benefit the wife only so long as she was not someone else's wife (which is indicated by the very existence of this clause) added to the presence of a child claiming as remainderman would have decided the issue for almost any American court *contra* the instant holding. The court after announcing its result hastened to support the finding by presenting supposititious cases [8] in which an innocent party would be forced into a life of single blessedness following divorce in order to retain a life estate. This was unnecessary and, since the cases presented scarcely indicated hardship, weakened an otherwise strong decision, which is in exact accord with the normal methods of construction by English courts.

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[1] Hinds v. Hinds, 7 Mackey 85 (D. C. 1888); Stultz v. Stultz, 107 Ind. 400 (1886); Fox v. Davis, 113 Mass. 255 (1873); Butlar v. Butlar, 67 N. J. Eq. 136, 56 Atl. 722 (1904); Galusha v. Galusha, 116 N. Y. 635, 22 N. E. 1114 (1889); Muhr's Estate, 59 Pa. Super. 386 (1915).

[2] Fitzgerald v. Chapman, 1 Ch. D. 563 (Eng. 1875). See also BISHOP, MARRIAGE AND DIVORCE (6th ed. 1881) 717; HILL, TRUSTEES (4th Am. ed. 1867) 671; LONG, DOMESTIC RELATIONS (3d ed. 1923) 206; 2 SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS (6th ed. 1921) §§ 1942, 1943.

[3] This can be done in England under 20 & 21 VICT. c. 85 § 45, and in a few of the American states.

[4] Instant case at 68. It is interesting to note that the opposite result could have been reached by disregarding the juxtaposition of the clauses and construing the literal meaning of the divesting clause only. This would bring this case in line with the cases where forfeiture depends on alienation or bankruptcy (see *In re* Muggeridge's Trusts, Johns 625 (Eng. 1860); but those cases are in a separate category since *In re* Chapman, [1904] 1 Ch. 431.

[5] Holmes, *The Theory of Interpretation* (1898) 12 HARV. L. REV. 417; THAYER, PRELIMINARY TREATISE ON EVIDENCE (1898) 412, 480; 5 WIGMORE, EVIDENCE (2d ed. 1923) 2458.

[6] Brown, *Problems of Construction Arising in the Law of Property—Particularly in the Law of Future Interests* (1930) 79 U. OF PA. L. REV. 385.

[7] This is the method normally used by the courts of England. See Brown, *op. cit. supra* note 6.

[8] Instant case pp. 88, 89.

INSURANCE—BANKRUPTCY—MORAL OBLIGATION AS INSURABLE INTEREST—After deceased's discharge in bankruptcy, defendant took out policies of insurance on his life, although defendant's claim was among those proved in the bankruptcy proceedings. *Held,* that deceased's moral obligation to pay defendant's claim, notwithstanding his discharge in bankruptcy, was sufficient to give the defendant an insurable interest in his life. *Livesay v. First Nat'l Bank,* 57 S. W. (2d) 86 (Tex. Comm. App. 1933).

Though it is not easy to define what will, in all cases, constitute an insurable interest,[1] it may be stated, generally, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor[2] of or as surety[3] for the insured, or from ties of blood[4] or marriage[5] to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life.[6] In order that one may have an insurable interest as creditor, there must be a real debt existing;[7] it may be contingent, restricted as to time, or indeterminate in amount, but it must be actual, such as will reasonably justify a well-grounded expectation of advantage, dependent on the life insured, so that the purpose of the person effecting the insurance may be to secure that advantage, and not merely to put a wager on human life.[8] It has been held, however, that a debt to which the bar of the statute of limitations might be applied is sufficient to vest in a creditor an insurable interest in the life of his debtor,[9] and it was on these cases that the instant court relied. The rule as generally stated, however, is that a mere moral claim is not sufficient to support an insurable interest as creditor,[10] and, although some courts have made exceptions in similar cases,[11] it seems that that

[1] See Loomis v. Eagle Life & Health Ins. Co., 6 Gray 396, 399 (Mass. 1856), where Chief Justice Shaw recognized this difficulty. See also Warnock v. Davis, 104 U. S. 775, 779 (1881); 1 BIDDLE, INSURANCE (1893) § 187.

[2] Crotty v. Union Mut. Life Ins. Co., 144 U. S. 621, 12 Sup. Ct. 749 (1891); Delaney v. Delaney, 175 Ill. 187, 51 N. E. 961 (1898); Reed v. Provident Sav. Life Ass. Society, 190 N. Y. 111, 82 N. E. 734 (1907); Ulrich v. Reinoehl, 143 Pa. 238, 22 Atl. 862 (1891).

[3] Embry's Adm'rs v. Harris, 107 Ky. 61, 52 S. W. 958 (1899); Scott v. Dickson, 108 Pa. 6 (1884); *cf.* Sides v. Knickerbocker Life Ins. Co., 16 Fed. 650 (W. D. Tenn. 1883).

[4] Loomis v. Eagle Life & Health Ins. Co., *supra* note 1 (parent and child); Burke v. Prudential Ins. Co., 155 Pa. 295, 26 Atl. 445 (1893) (grandparent and grandchild); Lord v. Dall, 12 Mass. 115 (1815) (brother and sister). *Contra:* Burton v. Connecticut Mut. Life Ins. Co., 119 Ind. 207, 21 N. E. 746 (1889) (grandparent and grandchild).

[5] Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457 (1876); Millard v. Brayton, 177 Mass. 533, 59 N. E. 436 (1901); see Knights of the Modern Maccabees v. Sharp, 163 Mich. 449, 128 N. W. 786 (1910).

[6] The rule is thus stated in Warnock v. Davis, *supra* note 1, at 779.

[7] Taussig v. United Security Life Ins. & Trust Co., 231 Pa. 16, 79 Atl. 810 (1911). The reasons for requiring insurable interest to support insurance policies are: (1) Policies not founded on insurable interest are speculative or wagering contracts; (2) Where insurable interest is lacking, the person to be benefited by the policy is interested in the death, rather than the life, of the person insured, and such contracts are therefore incentives to crime; and (3) there is a public policy requiring insurable interest; see 1 COOLEY, BRIEFS ON INSURANCE (2d ed. 1927) 333 *ff.* And, if these considerations are to be given any weight, it seems clear that there must be a real debt to constitute the insurable interest.

[8] See Taussig v. United Security Life Ins. & Trust Co., *supra* note 7.

[9] Rawls v. American Mut. Life Ins. Co., 27 N. Y. 282 (1863); Insurance Co. v. Dunscomb, 108 Tenn. 724, 69 S. W. 345 (1902); see Chicago Title & Trust Co. v. Haxtun, 129 Ill. App. 626 (1906); 1 MAY, INSURANCE (4th ed. 1900) § 108. These cases seem to be contrary to the considerations set forth *supra* note 7.

[10] Guardian Mut. Life Ins. Co. v. Hogan, 80 Ill. 35 (1875).

[11] Manhattan Life Ins. Co. v. Hennessy, 99 Fed. 64 (C. C. A. 5th, 1900) (assignment for benefit of creditors); Ferguson v. Massachusetts Mut. Life Ins. Co., 32 Hun. 306 (N. Y. 1884), *aff'd* without opinion in 102 N. Y. 647 (1886) (bankruptcy). While it might be possible to distinguish these cases from the instant one on the basis of their facts, their language certainly covers this situation; and they seem contrary to the principles set forth *supra* note 7.

rule should have been strictly applied in this case. Granting that the deceased debtor has a moral obligation to pay even after his discharge in bankruptcy,[12] that does not seem to constitute such an expectation of advantage in the creditor as to justify him in taking this insurance; his claim was dependent upon the generosity of the bankrupt, and, until there has been a new promise which would waive the bar of the discharge in bankruptcy, it is unreasonable to hold such a hypothetical claim to constitute an insurable interest.

RESTRAINT OF TRADE—SHERMAN ANTI-TRUST ACT—LEGALITY OF EXCLUSIVE SELLING AGENCY FOR THE MARKETING OF BITUMINOUS COAL—One hundred and thirty-seven producers of bituminous coal in the Appalachian territory, controlling 73 per cent. of the commercial output and 54 per cent. of the total output of the region, formed a corporation to serve as their exclusive agent in the selling and marketing of their product. The producers owned its entire capital stock, which was apportioned among them according to their productive capacity. The agency was to fix the price at which the coal was to be sold, and orders were to be prorated among the members. No member could sell outside the agency. It was found that the agency would eliminate competition among the members; that it would fix prices among the members; and, while it could not effect a monopoly or "fix" market prices, that it could affect prices in all markets.[1] *Held,* that the combination did not violate the Sherman Act, but that the court retain jurisdiction in case of future abuses. *Appalachian Coals, Inc. et al. v. United States,* 53 Sup. Ct. 471 (1933).

The principal case marks an important step toward a more enlightened interpretation of the Sherman Anti-trust Act and its relation to present-day business conditions.[2] It has been the settled policy of the court to look upon all combinations tending toward the restraint of trade, whether honest or dishonest in their purpose,[3] as violative of the spirit and letter of the Sherman Act.[4] The "rule of reason" propounded by Mr. Chief Justice White more than twenty years ago has been more a shibboleth than a guide in defining the policy of the court in

[12] Zavelo v. Reeves, 227 U. S. 625, 33 Sup. Ct. 365 (1913).

[1] A three-judge court for the western district of Virginia enjoined the producers from selling their coal through the defendant agency. Parker, J., in granting the injunction, wrote: "We sympathize with the plight of those engaged in the coal industry, whether as operators or as miners; but we have no option but to declare the law as we find it. We cannot repeal acts of Congress nor can we overrule decisions of the Supreme Court interpreting them." See instant case, 1 Fed. Supp. 339, at 349 (1932). See Comment (1932) 42 YALE L. J. 233; Comment (1933) 27 ILL. L. REV. 671; (1932) 1 GEO. WASH. L. REV. 151, for various aspects of the decision by the district court in the instant case. See Donovan, *Trusts Within the Law* (1932) 61 WORLD'S WORK 52, for an early discussion of the combination here involved.

[2] For excellent analyses of the problems raised by the Court's interpretations of the Anti-Trust Act, see Dickinson, *The Anti-Trust Laws and the Self-Regulation of Industry* (1932) 18 A. B. A. J. 600; Jaffee and Tobriner, *Legality of Price-Fixing Agreements* (1932) 45 HARV. L. REV. 1164; Oliphant, *Trade Associations and the Law* (1926) 26 COL. L. REV. 381. See also, Note (1932) 32 COL. L. REV. 291; Legislation (1932) 80 U. OF PA. L. REV. 730. In Continental Wall Paper Mfg. Co. v. Voight & Sons, 212 U. S. 227, 29 Sup. Ct. 280 (1909) the court clearly established the illegal *status* of the selling agency device.

[3] United States v. Hollis, 246 Fed. 611 (D. Minn. 1917); United States v. Reading Co., 253 U. S. 26, 40 Sup. Ct. 425 (1920); United States v. Trenton Potteries Co., 273 U. S. 392, 47 Sup. Ct. 377 (1927).

[4] Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502 (1911); American Tobacco Co. v. United States, 221 U. S. 106, 31 Sup. Ct. 632 (1911); Handler, *Industrial Mergers and the Anti-Trust Laws* (1932) 32 COL. L. REV. 179; Raymond, *Standard Oil and Tobacco Cases* (1912) 25 HARV. L. REV. 31.

anti-trust matters.[5] This subservience to the letter of the Act has brought forth criticism, no less striking for its eminence than for its quantity, which has become increasingly sharp since the beginning of the present depression in industry.[6] The Court has determined that combinations resulting from normal corporate consolidation which eliminate competition only incidental to their normal organization, but which do not aim at monopoly control, are not to be condemned.[7] But agreements between independent dealers, the purpose or effect of which is to eliminate competition among themselves and fix common selling prices, are held to be unreasonable restraints of trade.[8] In other words, by the "rule of reason," mere size of, or unexerted power in, a corporation is not condemnatory, but agreements or combinations which have a tendency to unduly restrict competition are violations of the Act. Several decisions a few years ago suggested a lightening of the restrictions imposed on co-operative activities,[9] but subsequent developments have discounted their significance.[10] It was reiterated that no sanction would be given to attempts at concerted action with respect to prices or production.[11] In casting aside these well-settled precedents, the Court, in the principal case, was guided chiefly by the deplorable state of the bituminous coal industry, which has been caused mainly by excessive productive capacity and

[5] See Dickinson, *loc. cit. supra* note 2.

[6] See generally, HANDLER, THE FEDERAL ANTI-TRUST LAWS—A SYMPOSIUM (1932); Bell, *Rule of Unreason in Restraint of Trade Cases* (1926) 12 VA. L. REV. 129. A great deal of the literature has been directed toward legislative modification of the Sherman Act. See Rhoads, *Proposed Changes in the Sherman Anti-Trust Act: Their Necessity and Validity* (1931) 79 U. OF PA. L. REV. 602; Probst, *Failure of the Sherman Anti-Trust Law* (1926) 75 U. OF PA. L. REV. 122; Hamilton, *The Problem of Trust Reform* (1932) 32 COL. L. REV. 173; Comment (1933) 27 ILL. L. REV. 671; Legislation (1932) 80 U. OF PA. L. REV. 730. For analyses of attempts by states to regulate prices and production of commodities vital to their economic existence, see Kern, *State Sanctioned Trade Restraints* (1933) 19 A. B. A. J. 211; Legislation (1932) 80 U. OF PA. L. REV. 436.

[7] United States v. U. S. Steel Corp., 251 U. S. 417, 40 Sup. Ct. 293 (1920) (50% control of the steel industry); United States v. International Harvester Co., 274 U. S. 693, 47 Sup. Ct. 748 (1927) (dominating the farm machine industry); United States v. United Shoe Machinery Co., 247 U. S. 32, 38 Sup. Ct. 473 (1918) (95% control of the shoe machine manufacturing industry); see FETTER, MASQUERADE OF MONOPOLY (1931) 362; WATKINS, INDUSTRIAL COMBINATIONS AND PUBLIC POLICY (1927) 258.

[8] United States v. American Linseed Oil Co., 262 U. S. 371, 43 Sup. Ct. 607 (1923) (combination of manufacturers of linseed oil for the exchange of price schedules and business information); United States v. American Column & Lumber Co., 257 U. S. 377, 42 Sup. Ct. 114 (1921) (an association of manufacturers of hardwood which gathered and disseminated trade statistics among its members and published suggested prices); United States v. Addyston Pipe and Steel Co., 125 U. S. 211, 20 Sup. Ct. 96 (1899) (an agreement between six manufacturers of pipe not to bid against each other); United States v. Union Pacific R. R., 226 U. S. 61, 33 Sup. Ct. 53 (1912) (purchase of controlling interest in the shares of a competing railroad); Chesapeake & Ohio Fuel Co. v. United States, 115 Fed. 610 (C. C. A. 6th, 1902) (an agreement between 14 coal-producing companies to sell through an exclusive selling agency at a uniform price [strikingly similar to the principal case]); Poultry Dealers Association v. United States, 4 F. (2d) 840 (C. C. A. 2d, 1925) (combination of more than 50% of the poultry buyers in New York City for the establishment of daily prices).

[9] Maple Flooring Association v. United States, 268 U. S. 563, 45 Sup. Ct. 578 (1925); Cement Manufacturers Association v. United States, 268 U. S. 588, 45 Sup. Ct. 586 (1925). But in the Maple case the court said that the gathering and dissemination of trade information relating to the cost and volume of production, previous selling prices and stocks on hand, were legal only if such information was exchanged "without . . . reaching . . . any agreement or any concerted action with respect to prices or production". See *supra* at 586, 45 Sup. Ct. at 586. See also, United States v. Trenton Potteries Co., *supra* note 3, at 400, 47 Sup. Ct. at 380; Donovan, *The Legality of Trade Associations* (1926) 11 ACAD. OF POL. SCI. PROC. 571.

[10] Federal Trade Commission v. Pacific States Paper Trade Association, 273 U. S. 52, 47 Sup. Ct. 255 (1927); United States v. Trenton Potteries Co., *supra* note 3.

[11] See HANDLER, *op. cit. supra* note 6, at 93; Note (1932) 32 COL. L. REV. 291.

unrestricted competition.[12] The decision of the court, cautiously worded,[13] denotes sanction of concerted action which will have a tendency to *stabilize* market prices of a distressed product and to raise such prices to a level higher than would otherwise obtain. If such action will lead to undue restraint on competition, the court reserved authority to enjoin its continuance.[14] Only future adjudications will adequately define the magnitude of this holding. Meanwhile, a decisive step forward has been taken.

TRUSTS—DISCRETIONARY TRUST—INTERFERENCE BY THE COURT WHERE THERE IS AN "ABUSE OF DISCRETION"—Plaintiff was beneficiary of a testamentary trust which instructed the trustees to use the principal (of $1000) and the income "entirely as they deem best for her". Plaintiff was required to undergo an expensive operation. Her husband was physically unable to work and consequently unable to pay for it. Plaintiff applied to the trustees for sufficient money to pay for medical expenses. The request was refused beyond giving her one year's interest. Plaintiff, while in the hospital, filed a bill praying that trustees be required to apply enough of the fund to defray the necessary medical expenses. *Held,* that the refusal to pay for medical expenses was an abuse of discretion which, if permitted, would defeat the settlor's intention. *Rinker's Adm'r et al. v. Simpson,* 166 S. E. 546 (Va., 1932).

Generally, courts of equity will not interfere to control the judgment of a trustee under a discretionary trust,[1] unless there is what the courts call an "abuse of discretion".[2] Obviously, no general rule can be laid down to determine when such an abuse exists.[3] There are, however, certain rather well-settled situations in which the court will interfere, as where the trustee acts dishonstly,[4] or from an improper motive.[5] Also, the court will interfere where the exercise

[12] See LAIDLER, CONCENTRATION IN AMERICAN INDUSTRY (1931) 67; ROCHESTER, LABOR AND COAL (1930) 50; see also opinion of instant case for an exposition of the demoralized state of the industry.

[13] See instant case at 478, 479.

[14] The agency had not yet been in operation when the case was tried.

[1] York v. Maryland Trust Co., 149 Md. 608, 131 Atl. 829 (1926); TRUSTS RESTATEMENT (Am. L. Inst. 1932) § 181.

[2] Martin v. McCune, 318 Ill. 585, 149 N. E. 489 (1925); Stein v. Safe Deposit & Trust Company of Baltimore, 127 Md. 206, 96 Atl. 349 (1915); Carter v. Young, 193 N. C. 678, 137 S. E. 875 (1927). The cases contain many statements to the effect that it is not possible to give a trustee such discretion as will place him beyond the control of a court of equity: McDonald v. McDonald, 92 Ala. 537, 9 So. 195 (1890); Cromie v. Bull, 81 Ky. 646 (1884); Haydel v. Hurck, 5 Mo. App. 267 (1878); Jones v. Jones, 8 Misc. 660, 30 N. Y. Supp. 177 (1894).

[3] The TRUSTS RESTATEMENT (Am. L. Inst. 1932) § 181 (d) suggests the following factors to be used in determining whether there is an abuse of discretion (at p. 12): "(1) the extent of the discretion intended to be conferred upon the trustee by the terms of the trust; (2) the purpose of the trust; (3) the nature of the power; (4) the existence or non-existence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged; (5) the motives of the trustee in exercising or refraining from exercising the power; (6) the existence or non-existence of an interest in the trustee conflicting with that of the beneficiaries."

[4] *In re* Smith, [1896] 1 Ch. 71 (trustee held liable for loss caused by an investment which he accepted a bribe to make, he being vested with discretion as to investments); see Turnure v. Turnure, 89 N. J. Eq. 197, 200, 104 Atl. 293, 294 (1918).

[5] Colton v. Colton, 127 U. S. 300, 8 Sup. Ct. 1164 (1888) (trustee, who was remainderman, was directed to provide for beneficiary as "in her judgment will be best". The court compelled the trustee to provide for support); McDonald v. McDonald, *supra* note 2 (trust for support of the trustee and others, payments to be made in his discretion. He applied all the income to his own use and that of two beneficiaries and refused to provide for the others. The court compelled him to provide for all the beneficiaries).

of judgment is left to the trustee and he fails to use his judgment.[6] If there is some standard provided by the will that will serve to test the reasonableness of the trustee's discretion, then the court will interfere if the exercise goes beyond the bounds of reasonable judgment.[7] On the other hand, it has been held that the court would not interfere, so long as the trustee acts honestly, where the terms of the trust dispense with any requirement of reasonableness in the exercise of the trustee's discretion.[8] Furthermore, the courts will not permit the trustee to exercise his judgment in any way which will tend to defeat the settlor's intention.[9] In the principal case there was no evidence of dishonesty or improper motive, nor any failure to exercise judgment. Nor did the will provide any standard whereby the reasonableness of the trustee's exercise of discretion can be tested, so that none of these reasons can be given for the interference of the court. On the other hand, there is no such provision for uncontrolled discretion as might prevent the court's interference in the absence of dishonesty. However, the dire need of the beneficiary, the serious necessity for medical services, and the obvious intention of the settlor to provide for her as far as both the principal and interest of the fund would permit, seem to justify the intervention of the court.

TRUSTS—SPENDTHRIFT TRUSTS—CLAIM OF TOWN FOR COSTS OF MAINTAINING BENEFICIARY IN JAIL—Beneficiary of spendthrift trust was committed to the county jail for refusal to comply with order of court for support of a bastard child. Plaintiff town was compelled to pay cost of maintaining beneficiary in jail and now seeks repayment from the income of trust funds in the hands of the trustee. *Held,* that the cost of supporting beneficiary in jail was a proper charge upon the income of such trust in the hands of the trustee. *Town of Shrewsbury v. Bucklin,* 163 Atl. 626 (Vt. 1933).

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[6] Stephenson v. Norris, 128 Wis. 242, 107 N. W. 343 (1906); Wilson v. Turner, 22 Ch. D. 521 (1883) (trustees were directed to apply income in their discretion for maintenance of a child. Trustees refused to exercise their discretion and paid the income to the child's father. The latter was held liable to repay the income).

[7] Russel v. Hartley, 83 Conn. 654, 78 Atl. 320 (1910) (will directed trustee to pay over so much of the principal *as was necessary for the support* of the beneficiary, if, in the judgment of the trustee, the income was insufficient for the purpose); *In re* Clark, 174 Iowa 449, 154 N. W. 759 (1915) (trustees were directed to apply funds "as may seem best in their judgment" *to advance the interest of the beneficiary*); Manning v. Sheehan, 75 Misc. 374, 133 N. Y. Supp. 1006 (1911) (trust for *support* of the beneficiary; there was a trust fund of $5,000, and the court ordered the trustee to pay $750 per year, and to pay a bill of $200 for medical attention and groceries).

[8] Whittaker v. McDowell, 82 Conn. 195, 72 Atl. 938 (1909) (where trustee was given "absolute discretion in the manner of the disposition", and his decision was to be conclusive; held that the court could not, after his death, appoint another trustee with powers as great); Keyser v. Mitchell, 67 Pa. 473 (1871) (payments were to be at "all times at the sole and absolute discretion of the trustee"; it was held that the court would not interfere, in an action brought by a creditor seeking to force payments, to control the trustee's discretion); Tabor v. Brooks, 10 Ch. D. 273 (1878) (where trustees had power to apply the income as they "in their uncontrolled and irresponsible discretion think proper", the court refused to interfere in the absence of proof of bad faith); Gisborne v. Gisborne, 2 App. Cas. 300 (1877) (where trustees were given absolute discretion and "uncontrollable authority" it was held that, in the absence of dishonesty, the court would not interfere).

[9] Murphy v. Delano, 95 Me. 229, 49 Atl. 1053 (1901); Rife v. Geyer, 59 Pa. 393 (1868) (testator gave to his son the income of a trust estate for life, with an express provision against alienation and liability for debts, and the trustee later gave the son a deed in fee simple. This was held to be inoperative as destroying the trust and defeating the intention of the settlor); Keyser v. Mitchell, *supra* note 8 (where income was to be expended at the discretion of the trustee, the court said that to subject the income to execution at the suit of a creditor would end the trustee's discretion and defeat the settlor's intention, the court refusing to control the trustee's discretion); (1929) 28 MICH. L. REV. 217.

Spendthrift trusts, where recognized and enforced,[1] were originally immune from the claims of all creditors of the beneficiary.[2] as long as the trust funds were in the possession of the trustee.[3] The creditor was required to seek his remedy against the beneficiary directly, and satisfaction might be had only by ascertaining the date of payment of income to the beneficiary and then issuing execution before the beneficiary had an opportunity of disposing of the money received. This rule has, in some states, been modified by statutes permitting the attachment of income accrued in the hands of the trustee.[4] In the absence of a statute the entire income is still exempt.[5] Under the general rule, however, the maintenance of a lunatic beneficiary in a state institution was held to be a charge upon the trust funds in favor of the state,[6] or a subdivision thereof,[7] which was liable for such expense. In these cases, the beneficiary had been in the asylum prior to the death of the settlor and this fact was seized upon to show that the settlor intended the beneficiary's support in the state institution to be within the purpose of the trust.[8] In the instant case the court found that the plaintiff's claim was within the intention of the settlor since the trust in terms provided for the support of the beneficiary. It is rather difficult to see by what theory support in a public institution is within the settlor's intention whereas support by a private individual falls without the pale of his intention.[9] The real ground of these decisions seems to be protection of public funds from use for private purposes on the basis that state support of one who has financial ability to support himself is not a public duty. Another very interesting problem would have been presented to the court if the suit had been to recover the cost of supporting the bastard child of the beneficiary. A wife who has been deserted by the beneficiary is entitled to charge the trust funds for her support and the support of the infant child of the beneficiary on the theory that the settlor intended the benefits of the trust to extend to the family of the beneficiary.[10] Although the support of the

[1] Spendthrift trusts are not enforceable in England nor in a minority of the American states. See (1932) 80 U. OF PA. L. REV. 465.

[2] A debtor may not create a spendthrift trust naming himself as beneficiary and thus exempt his estate from the claims of creditors. McColgan v. Walter Magee, Inc., 172 Cal. 182, 155 Pac. 995 (1916). In De Rousse v. Williams, 181 Iowa 379, 164 N. W. 806 (1917), where the defendant accepted his interest in the spendthrift trust in relinquishment of his right to contest his father's will it was held that this constituted such a giving up of property as to give creditors an interest in the trust.

[3] This rule included income accrued in the hands of the trustee and payable to the beneficiary. Congress Hotel v. Martin, 312 Ill. 318, 143 N. E. 838 (1924); Cromwell v. Converse, 108 Conn. 412, 143 Atl. 413 (1928).

[4] Such statutes are discussed in Runk, *Modification of the Rule Against Perpetuities* (1932) 80 U. OF PA. L. REV. 397, 405; see also Griswold, *The Beneficiary of a Spendthrift Trust* (1929) 43 HARV. L. REV. 63, 87.

[5] Congress Hotel v. Martin, *supra* note 3.

[6] Walter's Case, 278 Pa. 421, 123 Atl. 408 (1924). Recovery is possible only for support rendered after the creation of the trust. *Id.*, at 425, 123 Atl. at 409; Board of Freeholders v. Henry, 41 N. J. Eq. 388, 4 Atl. 858 (1886).

[7] *In re* Hohenshieldt's Estate, 105 Pa. Super. 18, 159 Atl. 71 (1932).

[8] In Walter's Case, *supra* note 6, at 424, 123 Atl. at 409, the court said, "The trust, in the present instance was intended to secure the comfort of the insane person; and the devotion of the income, or a part of the principal, to the satisfaction of obligations, incurred on his behalf, is the mere carrying out of the testatrix's directions."

[9] Where an ordinary creditor supplies the beneficiary with necessaries, the cases are unsettled as to the right of such creditor to charge the trust fund for the amount of his claim. For a discussion of cases on this point, see Griswold, *supra* note 4, at 79.

[10] England v. England, 223 Ill. App. 549 (1922); Gardner v. O'Loughlin, 76 N. H. 481, 84 Atl. 935 (1912); Moorehead's Estate, 289 Pa. 542, 137 Atl. 802 (1927); *cf.* Board of Charities v. Lochard, 198 Pa. 572, 48 Atl. 496 (1901) where the will provided that "all moneys . . . *are to be paid* to the legatees in person, and *to no one else*". Pennsylvania by statute now provides that the wife and children may attach 50% of the beneficiary's inter-

beneficiary's illegitimate children cannot be said to have been within the contemplation of the settlor, it would seem that a strong public policy favors the subjection of the trust income to such purpose, since a contrary result would throw the hapless offspring upon the bounty of the state.

TRUSTS—TENTATIVE TRUST—DEBTS OF DECEDENT AS A CHARGE UPON THE FUND—Decedent opened a savings account in her name "in trust for" petitioner. There was no delivery of the pass book nor notice to the beneficiary. Six drafts were drawn against the account in her lifetime. Petitioner sues administrator to compel surrender of the pass book. *Held,* that in so far as the general assets of decedent's estate were insufficient to pay the creditors and reasonable funeral and administration expenses, these obligations were a charge against the savings account. *In re Reich's Estate,* 262 N. Y. Supp. 623 (1933).

Since the decision of *Matter of Totten,*[1] the New York courts have consistently held [2] that a deposit of money by a person in his own name in trust for another establishes a tentative trust, and if the depositor predeceases the beneficiary without revoking the trust, a presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor.[3] The qualifying word "tentative" suggests that such a trust is a departure from the traditional requisites of the ordinary trust, and this becomes evident when it is realized that during the lifetime of the depositor he has absolute control [4] of the money. No trust was created in the lifetime of the depositor because the *res,* being the amount in the account upon the death of the depositor, is uncertain until his death; nor was a trust intended to be created upon the death of the depositor, because at that time he intended both legal and equitable title to pass to the beneficiary. The tentative trust theory is obviously a device for circumventing the requirements of the statute of wills.[5] The bank account is generally small in amount, and the court recognizes the lack of necessity for probating such instruments and also the unlikelihood of fraud in the bank deposit situation.[6] A

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est in satisfaction of a judgment for support. PA. STAT. ANN. (Purdon, 1930) tit. 20, § 243. Missouri has a similar statute, except that no limitation is placed upon the amount of income which may be reached; it also permits the wife to reach such funds in satisfaction of a decree for alimony. Mo. REV. STAT. (1929) § 569. At common law a divorce decree, terminating the marriage relation also terminated the right of the wife to obtain support from the trust fund since the wife was then regarded as an ordinary creditor, Eaton v. Eaton, 81 N. H. 275, 125 Atl. 433 (1924); but a divorce does not affect the right of the beneficiary's minor child since the latter still remains a member of the beneficiary's family.

[1] 179 N. Y. 112, 71 N. E. 748 (1904); Note (1904) 4 COL. L. REV. 502; (1904) 18 HARV. L. REV. 70.

[2] Hemmerich v. Union Dime Savings Inst., 205 N. Y. 366, 98 N. E. 499 (1912); *In re* Kive's Estate, 139 Misc. 273, 248 N. Y. Supp. 677 (1931); *In re* Schiffer's Estate, 142 Misc. 548, 254 N. Y. Supp. 871 (1931).

[3] The doctrine of Matter of Totten has been tentatively adopted by the American Law Institute. TRUSTS RESTATEMENT (Am. L. Inst. 1930) § 65. In Woodward's Estate, 14 D. & C. 363 (Pa. 1930) the court followed Gaffney's Estate, 146 Pa. 49, 23 Atl. 163 (1892) and held that upon death of the depositor, the named beneficiary was *prima facie* entitled to the deposit. For the rule in other jurisdictions, see Scott, *Trusts and the Statute of Wills* (1930) 43 HARV. L. REV. 521, 540; Note (1933) 81 U. OF PA. L. REV. 737.

[4] See Larremore, *Judicial Legislation in New York* (1905) 14 YALE L. J. 312, 315; *cf.* Scott, *loc. cit. supra* note 3.

[5] Nicklas v. Parker, 69 N. J. Eq. 743, 61 Atl. 267 (1905). See also Leaphart, *The Trust as a Substitute for a Will* (1930) 78 U. OF PA. L. REV. 626, 635.

[6] In addition, the tentative trust effectuates the dispositive intention of the depositor. Evidence is of course admissible to show that no trust was ever intended, Matter of Barefield, 177 N. Y. 387, 69 N. E. 732 (1904); or that the declaration of trust was made for the pur-

recognition of the true nature of the tentative trust as being a testamentary disposition sanctioned by the courts and not requiring special formality leads to the conclusion that the trust analogy should not be carried to further inaccuracy. It is not necessary to apply traditional trust theory when the question arises whether this devise is subject to an inheritance tax [7] or to the debts [8] of the decedent. It seems sensible to recognize the actual character of the transaction in these cases and treat the account as though it had been a devise properly executed and effective as of the time of the death of the depositor. The instant case candidly concedes the tentative trust to be a judicial vehicle added to the statutorily authorized methods for testamentary disposition of property, and allows the debts of decedent to be a charge upon the fund before it is paid over to the named beneficiary. Strict interpretation of the rule of *Matter of Totten* [9] without unnecessary and illogical extension will encourage its adoption by other jurisdictions.

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pose of evading by-law provisions of the savings institution. Brabrook v. Boston Five Cent Savings Bank, 104 Mass. 228 (1870). A subsequent will, inconsistent with the trust, has been held to be revocatory. *In re* Murray's Estate, 256 N. Y. Supp. 815 (1932); Note (1932) 42 YALE L. J. 141.

[7] It is generally held that the funds of a revocable trust are taxable since the transfer is to vest in enjoyment upon death of the depositor. *In re* Fulham's Estate, 96 Vt. 308, 119 Atl. 433 (1923); *cf.* Stimson, *When Revocable Trusts Are Subject to Inheritance Tax* (1927) 25 MICH. L. REV. 839.

[8] The court in the instant case followed the case of Beakes Dairy Co. v. Berns, 128 App. Div. 137, 112 N. Y. Supp. 529 (1908) in holding the fund subject to decedent's debts. In charging the fund with funeral expenses, the court reasoned that the presumption of absolute trust is merely a factual inference, overcome by the stronger inference arising from the "customary inclinations of mankind" that normal human beings intend to reserve enough money for decent burial, and therefore the trust fund was limited to the amount remaining after payment of funeral expenses. This devious process of reasoning is unnecessary if the fund is recognized as a testamentary transfer.

[9] In accord with Matter of Totten, see Milholland v. Whalen, 89 Md. 212, 43 Atl. 43 (1899); Dyste v. Farmers' & Mech. Bk., 179 Minn. 430, 229 N. W. 865 (1930); *cf.* Kuck v. Raftery, 117 Cal. App. 755, 4 P. (2d) 552 (1931).